

VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
Including professional corporations

1201 New York Avenue, N.W., Suite 1000
Washington, D.C. 20005-3917
(202) 962-4800, Fax (202) 962-8300
www.venable.com

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 2, 1998

Office of the Secretary
Attention: Ruth Dancey
Federal Communications Commission
1919 M Street, N.W., Suite 222
Washington, DC 20554

Re: CC Docket 95-155 - Toll-Free Service Access Codes; Emergency Petition

Dear Ms. Dancey:

Enclosed please find the eleven (11) copies of the "Joint Emergency Petition for Temporary Stay and Set-Aside of Certain Vanity and Branded Numbers in the 877 Service Access Code" inadvertently omitted from our filing earlier today.

I apologize for the error.

Thank you for your assistance, and please do not hesitate to contact me if you have any questions.

Sincerely,

Heather L. McDowell (ps)

Heather L. McDowell

Enclosures

No. of Copies rec'd 0+10
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
) CC Docket No. 95-155
Toll Free Service Access Codes)

**JOINT EMERGENCY PETITION FOR TEMPORARY STAY
AND SET-ASIDE OF CERTAIN VANITY AND BRANDED NUMBERS
IN THE 877 SERVICE ACCESS CODE**

Pursuant to sections 1.43, 1.44(e), and 1.429 (k) of the Commission's rules, 47 C.F.R. §§ 1.43, 1.44(e), and 1.429(k), The Direct Marketing Association ("The DMA") and the American Car Rental Association ("ACRA") hereby jointly petition the Commission to stay immediately, but temporarily, the application of its new rules requiring assignment of vanity and branded toll-free numbers in the 877 service access code ("SAC") on a first-come, first-served basis.^{1/} Specifically, The DMA and ACRA (collectively, "the Petitioners") request that the Commission direct the toll-free database administrator to establish a limited reserve of 877 numbers, restricted to 877 numbers that replicate toll-free

^{1/} In Re Toll Free Service Access Codes, *Fourth Report and Order and Memorandum Opinion and Order*, __ FCC Rcd. __, CC Docket No. 95-155 (Adopted March 27, 1998; Released March 31, 1998) ("*Fourth Toll-Free Order*").

numbers previously placed in the 888 reserve pool,^{2/} until the Commission acts on the Petition for Reconsideration that we intend to file in this proceeding and petitions that may be filed by other interested parties. The Petitioners' request for a temporary set aside of these 877 numbers is, thus, limited to: (1) the duration of the Commission's reconsideration proceedings; and (2) only 877 replications of numbers in the 888 SAC that were previously placed in "unavailable" status at the Commission's direction pending further ruling on the assignment and administration of toll-free numbers.

Incumbent subscribers of vanity and branded toll-free numbers in the 800 SAC will be irreparably harmed unless the Commission grants this relatively modest relief. Moreover, granting this relief will not unfairly disadvantage or prejudice other potential subscribers who desire 877 numbers. A maximum of 374,129 numbers are at issue,^{3/} and probably fewer given that some of those numbers have already been released by those who originally expressed interest. The set-aside is needed only for a short time, and all other 877 numbers will be available in the interim, beginning April 5th.

If all 877 numbers are released on a first-come, first-serve basis on April 5th, incumbent users of vanity numbers in the 800 and 888 SACs will be irreparably harmed even as the Commission is still reconsidering how, if at all, to

^{2/} See *In Re Toll Free Service Access Codes, Report and Order*, 11 FCC Rcd. 2496, ¶ 2 (1996) ("First Toll-Free Order").

^{3/} *Fourth Toll-Free Order* at ¶ 9.

accommodate those interests. These unique and highly valuable numbers cannot be replaced. There also will be no effective way to mitigate the harm that will ensue to businesses and others who have invested substantial sums to promote their current 800 numbers, and in newly released 888 numbers, when unscrupulous subscribers seek to capitalize on, or create, confusion among toll-free users as 877 is introduced.

The Petitioners intend to file a petition, perhaps jointly with other interested parties, requesting that the Commission re-evaluate its *Fourth Toll-Free Order*. The Commission has recognized that vanity and branded toll-free numbers are extremely valuable, particularly to those who have expended considerable resources to promote them.^{4/} Yet, its recent decision abdicates rather than fulfills its responsibility to ensure the fair, efficient, and orderly administration of these numbers. The decision is flawed in many respects. For instance, the *Fourth Toll-Free Order* reflects the Commission's reliance on patently incorrect assumptions about the likelihood that a right-of-first refusal plan would increase number exhaust. Only 374,199 numbers in the 888 SAC were set aside at the request of vanity number subscribers^{5/} - a mere .05% of the roughly 7.7 million numbers available in each SAC. *Vanity number subscribers are not causing the rapid depletion of toll-free numbers.* Yet, they more than any

^{4/} See, e.g., *Fourth Toll-Free Order* at ¶¶ 2, 11

^{5/} *Fourth Toll-Free Order* at ¶9.

other toll-free subscriber, and perhaps they alone, will suffer the economic harm and loss that will result from adopting first-come, first-serve plan for assigning 877 numbers.

The Commission evidently misunderstood The DMA's proposal for right-of-first refusal, since it would *reduce* number exhaust attributable to vanity subscribers' desire to reserve complementary numbers in new SACs by permitting them to relinquish their priority rights on condition that the number not be marketed with a particular acronym.

The order also states that under a first-come, first-serve scheme, subscribers will have less incentive over time to strategize to reserve complementary numbers in new SACs because users will become more familiar with the existence of multiple SACs.^{6/} We agree, but that is not, as the Commission suggests, a basis for ignoring the priority rights of incumbent subscribers. The same motivations will hold true for subscribers' desire to exercise a right-of-first-refusal - the incentive and need will generally diminish as time passes. Yet, a mechanism must be in place to safeguard the rights of those who need protection until time passes. The Commission cannot have it both ways: Vanity-number subscribers' continuing or waning interest in complementary toll-free numbers will be no different under first-come, first-serve than under right-of-first refusal.

^{6/} *Fourth Toll-Free Order* at ¶ 23.

The Commission also wrongly suggests that affording priority rights to incumbent subscribers risks granting a right-of-first refusal to multiple subscribers for the same number; under the approach we advocate, that would not be possible. While the Commission purports to address issues of "fairness," the *Fourth Toll-Free Order* speaks only to the concerns of prospective 877 subscribers, not the unfairness to incumbent subscribers. The Petitioners want fairness for both.

The *Fourth Toll-Free Order* repeatedly indicates that the Commission, in its rush to issue a decision before April 5th, did not adequately consider, or in some instances even have a chance to consider, each of the various proposals and alternative proposals advanced to address its concerns. This includes suggestions related to the right-of-first-refusal approach that The DMA and others have advocated.²⁷ The Commission should not sacrifice a thoughtful decision grounded in a fully-developed record, reasoned policy, and sound legal judgment because it is under pressure to track the 877 implementation schedule, when a temporary stay will not materially delay implementation of the 877 SAC.

The Commission has the opportunity to correct these and other shortcomings of its decision on reconsideration. Failing to set aside this limited pool of 877 numbers, however, would deprive incumbent subscribers of any remedy for the Commission's errors. Indeed, tossing all of the 877 numbers into

²⁷ See, e.g., Letter to Chairman William E. Kennard from Ian D. Volner, Counsel to The Direct Marketing Association (March 31, 1998).

the general pool effectively pre-judges any petition for reconsideration that may be filed: Once a number is released to the general pool, a subscriber with superior rights and interests in a number may find it forever lost. Allowing the general release of the small pool of 877 numbers at issue here while the Commission re-examines its decision would inexcusably prejudice and disadvantage incumbent 800-number subscribers who have devoted enormous resources to market their toll-free numbers to maximize brand and reputation recognition.

There is urgent need for the limited relief the Petitioners' seek. The 877 SAC will be deployed on April 5, 1998 - just 3 days hence and certainly well before the Commission will pass on our reconsideration petition or other petitions or appeals filed by parties to this proceeding. The Petitioners' request further meets the standard set forth in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*^{8/} Thus, Petitioners request that the Commission direct the database administrator to place in "unavailable" status those 877 numbers that replicate one of the approximately 374,000 numbers in

^{8/} 559 F.2d 841 (D.C. Cir. 1977).

the 888 SAC set aside at incumbent subscribers' request, while the Commission reconsiders its decision in this proceeding.

Respectfully submitted,



Ian D. Volner

Heather L. McDowell

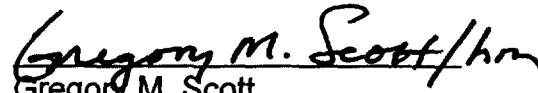
Venable, Baetjer, Howard, & Civiletti, L.L.P.

1201 New York Avenue, N.W., Suite 1000

Washington, D.C. 20005

202/962-4800

Counsel for The Direct Marketing Association



Gregory M. Scott

Collier, Shannon, Rill & Scott

3050 K Street, N.W., Suite 400

Washington, D.C. 20007

202/342-8400

Counsel for the American Car Rental
Association

April 2, 1998